

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

COLUMBIA PARK GOLF COURSE,  
INC., Washington  
corporation,

Plaintiff,

v.

CITY OF KENNEWICK, municipal  
corporation in and for the  
State of Washington; JAMES R.  
BEAVER, Mayor of Kennewick;  
ROBERT HAMMOND, City Manager  
of Kennewick; and JOHN S.  
ZIOBRIO, City Attorney for  
Kennewick,

Defendants.

NO. CV-07-5054-EFS

**ORDER GRANTING AND DENYING IN  
PART DEFENDANTS' MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendants' Motion for Partial Summary Judgment on RCW 4.96 Defense. (Ct. Rec. 58.) Plaintiff opposes the motion in part, contending that its contract claims are not barred by RCW 4.96 *et al.* After reviewing the submitted material and relevant authority, the Court is fully informed and grants and denies in part Defendants' motion. The reasons for the Court's Order are set forth below.

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1 **A. Background<sup>1</sup>**

2 On February 2, 2007, Plaintiff's counsel Robert Dunn wrote a "demand  
3 letter" to the City of Kennewick ("the City"), which included a copy of  
4 the to-be-filed complaint. (Ct. Rec. 46 ¶ 55; Ct. Rec. 63 ¶ 1.) City  
5 attorney John Ziobro drafted an internal memorandum and circulated it on  
6 February 6, 2007, to the City Manager, the City Council, and the Mayor.  
7 The internal memorandum detailed, inter alia, that CPGC's contract claims  
8 were not subject to the notice requirements of RCW 4.96 *et seq.* (Ct.  
9 Rec. 63 ¶ 2.) On February 12, 2007, CPGC filed its RCW 4.96 Notice of  
10 Tort Claims by mailing it to the City's post office box. (Ct. Rec. 46  
11 ¶ 57; Ct. Rec. 63 ¶ 3.) Also, on February 12, 2007, CPGC filed this  
12 lawsuit alleging, among other theories, contract claims and tort claims.

13 **B. Authority and Analysis**

14 Defendants argue CPGC's contract and tort claims are barred by its  
15 failure to timely file a notice of claim as required by RCW 4.96 *et al.*  
16 CPGC agrees its tort claims are barred because of its failure to provide  
17 notice to the City at least sixty days before filing this action. Given  
18 CPGC's concession, the Court grants Defendants' motion in part and  
19 dismisses CPGC's tort claims. CPGC maintains, however, that RCW 4.96 *et*  
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21 <sup>1</sup> In ruling on a motion for summary judgment, the Court considered  
22 the facts, including the parties' Joint Statement of Uncontroverted Facts  
23 (Ct. Rec. 72), and all reasonable inferences therefrom in the light most  
24 favorable to Plaintiff, the party opposing the motion. *See United States*  
25 *v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per curium*). The following  
26 factual recitation was created utilizing this standard.

1 al. does not apply to contract claims and therefore it may pursue its  
2 contract claims.

3 The two statutes at issue are RCW 4.96.010 and 4.96.020. These  
4 statutes have been amended since their initial enactment in 1967, and  
5 Washington courts have been asked to analyze these sections on a number  
6 of occasions. Unfortunately, the Washington Supreme Court has not  
7 resolved, under the current version of the statutes, the question of  
8 whether a notice of contract claim must be presented to the local  
9 governmental entity in advance of a lawsuit.

10 The Court must interpret a statute to give effect to the Washington  
11 Legislature's intent. See *Stewart Carpet Serv. v. Contractors Bonding*  
12 *& Ins. Co.*, 105 Wn.2d 353, 358 (1986). In doing so, the Court is to look  
13 at the statute's subject matter and language, as well as the  
14 constructions placed on the statute by the Washington courts. *Id.*; *Pac.*  
15 *Sound Res. v. Burlington N. Santa Fe Ry.*, 130 Wn. App. 926, 935 (2005).  
16 The statute is to be given a "rational interpretation founded upon its  
17 design." *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 421 (1971)  
18 (quoting *Discargar v. City of Seattle*, 25 Wn.2d 306, 311-12 (1946)).

19 1. Legislative enactments

20 The 1967 versions of RCW 4.96.010 and 4.96.020 apply only to claims  
21 for "damages arising out of tortious conduct" because this phrase was  
22 used repeatedly and general "damages" language was not used. Both  
23 sections were amended in 1993. The 1993 amendment to RCW 4.96.010(1) is  
24 the current version and reads in pertinent part:

25 All local governmental entities, whether acting in a  
26 governmental or proprietary capacity, shall be liable for  
damages arising out of their tortious conduct, or the tortious  
conduct of their past or present officers, employees, or  
volunteers while performing or in good faith purporting to

1 perform their official duties, to the same extent as if they  
2 were a private person or corporation. Filing a *claim for*  
3 *damages* within the time allowed by law shall be a condition  
4 precedent to the commencement of any action claiming damages.  
The laws specifying the content for such claims shall be  
liberally construed so that substantial compliance therewith  
will be deemed satisfactory.

5 RCW 4.96.010(1) (emphasis added). The statute's first sentence uses the  
6 phrase "damages arising out of their tortious conduct," while the second  
7 sentence uses the general phrase "claim for damages."

8 RCW 4.96.020 was also amended in 1993 by adding a sixty-day required  
9 tolling period and the following two subsections:

10 (1) The provisions of this section apply to claims for damages  
11 against all local governmental entities.

12 (2) All claims for damages against any such entity for damages  
13 shall be presented to and filed with the governing body  
thereof within the applicable period of limitations within  
which an action must be commenced.

14 Then, in 2001, the Legislature amended RCW 4.96.020 to require the  
15 appointment of an agent to receive claims. RCW 4.96.020 was amended  
16 again in 2006 to reflect that it applies to claims for damages against  
17 local governmental officers, employees, and volunteers, and that a  
18 failure of the local governmental entity to appoint an agent precludes  
19 the entity from raising a defense under RCW 4.96. Accordingly, the  
20 following is the current version of RCW 4.96.020:<sup>2</sup>

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22 <sup>2</sup> The captions for RCW 4.96.010 and 4.96.020 specifically refer to  
23 "tortious conduct," however "headings are generated by the code reviser  
24 and do not change the meaning of the law unless specifically adopted by  
25 the Legislature." *Washington v. Cooley*, 53 Wn. App. 163, 166 (1989); RCW  
26 1.08.015.

1 (1) The provisions of this section apply to *claims for damages*  
2 against all local governmental entities and their officers,  
employees or volunteers, acting in such capacity.

3 (2) The governing body of each local governmental entity shall  
4 appoint an agent to receive *any claim for damages* made under  
5 this chapter. The identity of the agent and the address where  
6 he or she may be reached during the normal business hours of  
7 the local governmental entity are public records and shall be  
8 recorded with the auditor of the county in which the entity is  
9 located. *All claims for damages* against a local governmental  
entity, or against any local governmental entity's officers,  
employees, or volunteers, acting in such capacity, shall be  
presented to the agent within the applicable period of  
limitations within which an action must be commenced. The  
failure of a local governmental entity to comply with the  
requirements of this section precludes that local governmental  
entity from raising a defense under this chapter.

10 (3) *All claims for damages arising out of tortious conduct*  
11 must locate and describe the conduct and circumstances which  
12 brought about the injury or damage, describe the injury or  
13 damage, state the time and place the injury or damage  
occurred, state the names of all persons involved, if known,  
and shall contain the amount of damages claimed, together with  
a statement of the actual residence of the claimant at the  
time of presenting and filing the claim and for a period of  
six months immediately prior to the time the claim arose. If  
the claimant is incapacitated from verifying, presenting, and  
filing the claim in the time prescribed or if the claimant is  
a minor, or is a nonresident of the state absent therefrom  
during the time within which the claim is required to be  
filed, the claim may be verified, presented, and filed on  
behalf of the claimant by any relative, attorney, or agent  
representing the claimant.

19 (4) No action shall be commenced against any local  
20 governmental entity, or against any local governmental  
entity's officers, employees, or volunteers, acting in such  
21 capacity, for *damages arising out of tortious conduct* until  
sixty days have elapsed after the claim has first been  
presented to and filed with the governing body thereof. The  
applicable period of limitations within which an action must  
be commenced shall be tolled during the sixty-day period.

1 RCW 4.96.020 (emphasis added). The first two subsections utilize the  
2 language "claims for damages," while the latter two subsections utilize  
3 the language "damages arising out of tortious conduct."

4 2. Case law

5 In 1993, the Washington Supreme Court analyzed the recently-enacted  
6 1993 version and decided, "RCW 4.96.010 authorizes the filing of a claim  
7 for damages arising from tortious conduct as a condition precedent to  
8 bringing a suit, but not for other types of damages claims . . . ."  
9 *Wilson v. City of Seattle*, 122 Wn.2d 814, 822-23 (1993). The Washington  
10 Supreme Court specifically noted that the "1993 amendments do not affect  
11 our analysis in this case." *Id.* at 819 n.1. RCW 4.96.010(1) has not  
12 been amended since 1993, and the amendments to RCW 4.96.020 since 1993  
13 have not changed the "damages" language.

14 Notwithstanding the *Wilson* decision, the Washington Court of Appeals  
15 in 1994 in *Harberd v. City of Kettle Falls* determined that filing a  
16 notice of claim with the government entity is a condition precedent for  
17 both tort and contract claims - without citation to *Wilson*. 120 Wn. App.  
18 498 (2004). Defendants maintain that *Harberd* can be reconciled with  
19 *Wilson* because the two cases analyzed different versions of the statute;  
20 this is incorrect as both cases analyzed the 1993 version of the  
21 statutes. Accordingly, there is a conflict between the holdings of these  
22 two cases.

23 3. Analysis

24 This Court is to apply Washington state law to resolve state law  
25 claims. *Erie R.R. C. v. Tompkins*, 304 U.S. 78, 79 (1938). When the  
26 Washington Supreme Court has spoken, this Court is to accept its  
pronouncement "unless [the Washington Supreme Court] has later given

1 clear and persuasive indication that its pronouncement will be modified,  
2 limited, or restricted." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236  
3 (1940); see *Air-Sea Forwarders v. Air Asia Co.*, 880 F.2d 176, 186 (9th  
4 Cir. 1989). When the Washington Supreme Court has not spoken, a  
5 Washington Court of Appeals' decision is "a datum for ascertaining state  
6 law which is not to be disregarded by a federal court unless it is  
7 convinced by other persuasive data that the highest court of the state  
8 would decide otherwise. *West*, 311 U.S. at 237.

9 Here, the Washington Supreme Court spoke in *Wilson*. Although it is  
10 arguable that the Legislature intended the 1993 amendments to create a  
11 notice-of-claim-filing condition precedent for all claims - both contract  
12 and tort as the Court of Appeals decided in *Harberd* -, the Supreme Court  
13 specifically noted in *Wilson* that the 1993 amendments did not alter its  
14 determination that a notice of claim was a condition precedent only for  
15 tort claims. Defendants argue, without citation to any authority, that  
16 the Washington Supreme Court's decision to deny review of *Harberd*  
17 indicates the Supreme Court agrees with the *Harberd* decision. The Court  
18 concludes that denial of review is not "clear and persuasive indication"  
19 that the Supreme Court will modify its *William's* holding. See *West*, 311  
20 U.S. at 236.

21 Defendants also argue the Washington Supreme Court's failure to  
22 address *Harberd* in its subsequent cases analyzing RCW 4.96.010 and  
23 4.96.020 reflects the Supreme Court's agreement with *Harberd*. This  
24 argument is tenuous at best given that the issues before the Washington  
25 Supreme Court in the cases following *Harberd* did not present any need to  
26 address *Harberd* or *Wilson*: *Castro v. Stanwood School Distict*, 151 Wn.2d  
221 (2004) (addressing the sixty-day tolling period in a negligence

1 action); *Boesteder v. City of Renton*, 155 Wn.2d 18 (2005) (involving  
2 nuisance, trespass, and 42 U.S.C. § 1983 civil rights claims); *Troxell*  
3 *v. Rainier Public School District*, 154 Wn.2d 345 (2005) (calculating  
4 sixty-day tolling period in a tort action). In fact, in one of the cases  
5 cited by the City, the Washington Supreme Court stated, "the Court of  
6 Appeals wrongly concluded that since petitioners' unfair labor practice  
7 claim sounded in tort, the claim was subject to former RCW 4.96.020.  
8 Unfair labor practice claims under chapter 41.56 RCW are not tort claims  
9 for damages and are thus not subject to the claims filing statute."  
10 *Wright v. Terrell*, \_\_ Wn.2d \_\_, 170 P.3d 570, 571-72 (2007). This  
11 statement indicates the Supreme Court will continue to abide by its  
12 decision in *Wilson*. See also *Burnett v. Tacoma City Light*, 124 Wn. App.  
13 550, 558 n.11 (2004) (citing to *Wilson* for the proposition that "RCW  
14 4.96.010(1) authorizes claim filing ordinances only for damages arise out  
15 of tortious conduct of a local government entity").

16 Defendants also argue the Legislature is assumed to know the *Harberd*  
17 decision and therefore the Legislature's failure to clarify that RCW  
18 4.96.010 and 4.96.020 only create a claims-filing condition precedent for  
19 tort claims indicates that the Legislature agrees with *Harberd*. The  
20 Legislature has not appeared to amend these statutes in response to  
21 *Harberd*; however, the Legislature is presumed to know about *Wilson* as  
22 well, which specifically ruled that presenting a claim is not a condition  
23 precedent to actions other than those seeking damages for tortious  
24 conduct. The *Wilson* decision is a Washington Supreme Court decision and  
25 therefore prevails over the conflicting Court of Appeals' *Harberd*  
26 decision.



1 In addition, based on this Court's interpretation of the statutes,  
2 the Court agrees with *Wilson*. In RCW 4.96.010, after specifically  
3 referring to "damages arising out of their tortious conduct, or the  
4 tortious conduct of their past or present officers . . . ," the  
5 Legislature opted to use the shorter phrase "filing a claim for damages."  
6 This shorter phrase does not change the scope of RCW 4.96.010. Rather,  
7 the Legislature simply used a shorter phrase when specifying that the  
8 claim for damages caused by tortious conduct must be filed within the  
9 time for and prior to commencement of such action - this did not change  
10 the character of the conduct causing damage.

11 RCW 4.96.020 sets forth the procedural steps for filing the claim  
12 for damages as defined in RCW 4.96.010. RCW 4.96.020 does not by its use  
13 of the phrase "claims for damages" expand the scope of RCW 4.96.010. As  
14 used within RCW 4.96.020(1), the phrase "claims for damages" simply  
15 states that the "provisions of this section" applies to claims for  
16 damages which are explicitly stated as "claims for damages arising out of  
17 tortious conduct" in subsections (3) and (4). There is nothing to  
18 indicate any claim filing time limits or procedures for any other type  
19 of damages - further evidence to this Court that the claim-filing  
20 procedures are for "damages arising out of tortious conduct." Also,  
21 nothing in RCW 4.96.020(2) changes that. Subsection (2) requires the  
22 appointment of an agent to accept such claims and the presentation of  
23 such claims to that agent with preclusive effects if the local government  
24 entity fails to do so. This legislative amendment alters nothing about  
25 the character of the damages as those "arising out of tortious conduct"  
26 as defined by RCW 4.96.010(1). Accordingly, the Court finds filing a  
notice of claim is not a condition precedent to a contract action.

1 Defendants did not contest CPGC's position that its claims of  
2 promissory estoppel, quantum meruit, and good faith and fair dealing are  
3 contract claims. Accordingly, *Wilson* requires this Court to conclude  
4 that CPGC's breach of contract, promissory estoppel, quantum meruit, and  
5 good faith and fair dealing claims are not barred by RCW 4.96 *et seq.*<sup>3</sup>  
6 Therefore, Defendants' motion is denied in part.

7 In its Reply, Defendants ask the Court to certify the question of  
8 whether filing a notice of claim is a condition precedent to filing  
9 contract claims if the Court finds this question is unresolved. RCW  
10 2.60.020 provides:

11 when in the opinion of any federal court before whom a  
12 proceeding is pending, it is necessary to ascertain the local  
13 law of this state in order to dispose of such proceeding and  
14 the local law has not been clearly determined, such federal  
15 court *may certify* to the supreme court for answer the question  
16 of local law involved and the supreme court shall render its  
17 opinion in answer thereto.

18 (Emphasis added). In review of *Wright* and *Burnett*, this Court is firmly  
19 convinced *Wilson* remains the prevailing authority for the view that RCW  
20 4.96 *et al.* applies only to tort claims and that there is no ambiguity  
21 which requires referral of this question to the Washington Supreme Court.

22 Accordingly, **IT IS HEREBY ORDERED:**

23 1. Defendants' Motion for Partial Summary Judgment on RCW 4.96  
24 Defense (**Ct. Rec. 58**) is **GRANTED** (dismissal of CPGC's tort claims:  
25 intentional and fraudulent misrepresentation/bad faith, tortious  
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25 <sup>3</sup> CPGC's civil rights claim is not subject to the notice  
26 requirements of RCW 4.96 *et seq.* either. See *Wright v. Terrell*, 170 P.3d  
570 (2007).

1 interference with business expectancy, negligent misrepresentation, and  
2 negligence claims) **and DENIED IN PART** (contract claims).

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter  
4 this Order and provide copies to counsel.

5 **DATED** this 4th day of March, 2008.

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7  
8 s/Edward F. Shea  
9 EDWARD F. SHEA  
United States District Judge

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